Amanah Butler (M) Sdn Bhd v Yike Chee Wah

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-10 OF 1994
GOPAL SRI RAM, NH CHAN AND MOKHTAR SIDIN JJCA
17 FEBRUARY 1997

Labour Law *— Employment — Termination of employment — Whether reduction in payment of bonus amounted to dismissal — Whether employer was justified in reducing the amount of bonus paid — Whether employer had committed breach of contract — Industrial Relations Act 1967 s 20(1)*

The respondent was a manager in the appellant's organization. The respondent's contract provided for a fixed salary and a percentage of the profits annually earned by the appellant. In February and June 1991, Bank Negara wrote two letters to the appellant, the first informing the appellant that it could no longer engage in profit-sharing with its employees and advising that employee contracts be renegotiated accordingly, and the second (in response to a letter from the appellant), stating that the payment of bonuses to employees was acceptable so long as the bonus paid was not a predetermined percentage of the appellant's profit. The respondent's contract, however, was never renegotiated.

In August 1991, the respondent received a bonus which was far less than that previously earned by commission. The appellant justified the smaller bonus by citing the respondent's poor performance. The respondent considered himself dismissed and ceased working for the appellant. He made an application under s 20(1) of the Industrial Relations Act 1967 ('the Act'), and after an unsuccessful attempt to reconcile the dispute, the Director General referred the case to the Industrial Court.

In the Industrial Court, the respondent alleged that the appellant had unilaterally varied the profit-sharing clause in his contract, and submitted evidence of various letters between himself and the appellant. The appellant submitted that the bonus payment was not a contractual right and that the quantum of bonus paid was discretionary. The Industrial Court dismissed the respondent's complaint, as the personnel manual stated specificially that payment under the profit-sharing scheme was not contractual and was based on the merits of the employee's performance. The appellant had thus not breached the contract, and there was no dismissal of the respondent.

The respondent applied for and was granted certiorari by the High Court. The Industrial Court's award was quashed and the case was remitted back to the Industrial Court for re-adjudication. The High Court reasoned that the Industrial Court had failed to consider

important evidence, such as the letters written by the appellant to Bank Negara and hence had erred in its determination of the matter.

The appellant appealed, stating that the directive from Bank Negara, which mandated the appellant to cease sharing profits with its employees, had been overlooked, and thus justified the appellant's treatment of the respondent. The respondent argued that the appellant was bound by his original pleadings in the Industrial Court and thus its justification for the bonus — the respondent's misconduct — had to be considered and no new justification could be raised at the appeal stage.

Held, dismissing the appeal:

(1) The appellant was bound by its pleadings and could not therefore rely on the letters from Bank Negara as justification for its actions because they had not been pleaded in the Industrial Court below (see pp 758H–I and 759C–I); *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 and *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira* [1996] 3 MLJ 489 followed.

(2) The High Court's finding that the Industrial Court had acted unreasonably was affirmed. Considering the merits of the case, it was clear that the appellant's justification for the reduction in the appellant's bonus was not supported by the evidence, and hence the respondent was a victim of unfair labour practice (see p 760E–F); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed.

(3) The High Court remedy of an order for the Industrial Court to rehear the matter was not useful as it would only result in delay of the final adjudication of the matter. The Court of Appeal had the jurisdiction and power to grant relief despite the intention to dismiss the appeal. Taking into account the facts and circumstances of the case, the proper remedy was compensation in lieu of reinstatement. As no evidence of quantum was put forward, the matter was remitted to the Industrial Court to make this assessment (see p 761F–I); *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489 and *Kumpulan Perangsang Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* (Supreme Court Civil Appeal No 02–57–93 (yet unreported)) followed.

Per curiam:

No useful purpose would be served by saying whether the respondent was 'constructively dismissed'. The phrase 'constructive dismissal' was a mere label. It did nothing to clarify matters. On the other hand,

it caused confusion. It would be better that the phrase was not resorted to at all (see p 761B–C). A

[Bahasa Malaysia summary

Penentang merupakan seorang pengurus dalam pertubuhan perayu. Kontrak penentang memperuntukkan suatu gaji tetap dan peratusan keuntungan yang didapati oleh perayu setiap tahun. Dalam bulan Februari dan Jun 1991, Bank Negara telah menulis dua pucuk surat kepada perayu, di mana yang pertama memberitahu perayu bahawa ia tidak boleh lagi melibatkan diri dalam pembahagian keuntungan dengan pekerjanya dan menasihati bahawa kontrak pekerja haruslah dirunding semula dengan wajar, dan yang kedua (sebagai balasan kepada sepucuk surat daripada perayu), menyatakan bahawa bayaran bonus kepada pekerja boleh diterima setakat mana bonus yang dibayar bukan merupakan peratusan keuntungan perayu yang telah ditentukan terlebih dahulu. Walau bagaimanapun, kontrak penentang tidak pernah dirunding semula. B C D

Dalam bulan Ogos 1991, penentang telah menerima bonus yang jauh lebih sedikit daripada apa yang didapati melalui komisyen. Perayu memberi justifikasi kepada bonus yang lebih kecil atas alasan prestasi penentang yang kurang memuaskan. Penentang menganggap dirinya dipecat dan berhenti bekerja untuk perayu. Dia membuat suatu permohonan di bawah s 20(1) Akta Perhubungan Perindustrian 1967 ('Akta tersebut'), dan selepas kegagalan percubaan untuk menyelesaikan pertikaian, Ketua Pengarah merujuk kes itu kepada Mahkamah Perusahaan. E

Di Mahkamah Perusahaan, penentang mengatakan bahawa perayu telah mengubah fasal pembahagian keuntungan secara satu pihak dalam kontraknya, dan mengemukakan keterangan pelbagai surat antara dirinya dan perayu. Perayu berhujah bahawa bayaran bonus tidak merupakan suatu hak kontraktual dan bahawa kuantum bonus yang dibayar bergantung kepada budi bicara. Mahkamah Perusahaan menolak aduan penentang, oleh kerana manual personel menyatakan secara spesifik bahawa bayaran di bawah skim pembahagian keuntungan bukanlah kontraktual dan adalah berdasarkan merit prestasi pekerja. Dengan itu, perayu tidak memungkir kontrak itu, dan tiada pemecatan penentang. F G

Penentang memohon untuk dan diberikan certiorari oleh Mahkamah Tinggi. Award Mahkamah Perusahaan dibatalkan dan kes diremit balik kepada Mahkamah Perusahaan untuk penghukuman semula. Mahkamah Tinggi menaakul bahawa Mahkamah Perusahaan telah gagal mempertimbangkan keterangan yang penting, seperti surat yang ditulis oleh perayu kepada Bank Negara dan justeru itu telah melakukan kesilapan dalam penentuan perkara itu. H I

Perayu membuat rayuan, dengan menyatakan bahawa arahan dari Bank Negara, yang mewajibkan perayu berhenti membahagikan

keuntungan dengan pekerjanya, telah terlepas perhatian, dan justeru itu memberi justifikasi kepada layanan perayu terhadap penentang. Penentang berhujah bahawa perayu adalah terikat oleh plidingnya yang asal di Mahkamah Perusahaan dan maka justifikasinya untuk bonus itu — salah laku penentang — harus dipertimbangkan dan tiada justifikasi baru boleh dibangkitkan di tahap rayuan.

Diputuskan, menolak rayuan:

(1) Perayu adalah terikat oleh plidingnya dan oleh itu tidak boleh bergantung kepada surat dari Bank Negara sebagai justifikasi untuk tindakannya sebab mereka tidak dihujahkan di Mahkamah Perusahaan (lihat ms 758H–I dan 759C–I); *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 dan *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira* [1996] 3 MLJ 489 diikut.

(2) Pendapat Mahkamah Tinggi bahawa Mahkamah Perusahaan telah bertindak secara tidak munasabah disahkan. Memandangkan merit kes, adalah jelas bahawa justifikasi perayu untuk potongan dalam bonus perayu tidak disokong oleh keterangan, dan justeru itu penentang merupakan mangsa amalan buruh yang tidak adil (lihat ms 760E–F); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 diikut.

(3) Remedi Mahkamah Tinggi atas suatu perintah supaya Mahkamah Perusahaan mendengar semula perkara itu tidak berfaedah kerana ia hanya akan mengakibat dalam kelewatan penghukuman muktamad perkara tersebut. Mahkamah Rayuan mempunyai budi bicara dan kuasa untuk memberikan relief meskipun terdapat maksud untuk menolak rayuan ini. Dengan mengambil kira fakta dan keadaan kes itu, remedi yang wajar adalah pampasan sebagai ganti pengembalian semula jawatan. Oleh kerana tiada keterangan kuantum telah dikemukakan, perkara itu diremit kepada Mahkamah Perusahaan untuk membuat penilaian ini (lihat ms 761F–I); *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489 dan *Kumpulan Perangsang Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* (Rayuan Sivil Mahkamah Agung No 02–57–93 (belum dilaporkan)) diikut.

Per curiam:

Tiada apa-apa manfaat yang terhasil dengan mengatakan sama ada penentang telah dipecat secara konstruktif. Ungkapan 'pemecatan konstruktif' adalah label semata-mata. Ia tidak membuat apa-apa bagi menjelaskan perkara. Sebaliknya, ia menyebabkan kekeliruan. Adalah lebih baik jika ungkapan itu tidak digunakan sama sekali (lihat ms 761B–C).]

Notes

For cases on termination of employment, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 790–835.

Cases referred to

Ang Beng Teik v Pan Global Textile Bhd, Penang [1996] 3 MLJ 137 (refd)

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129 (folld)

Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489 (folld)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh (Supreme Court Civil Appeal No 02–57–93 (yet unreported) (folld)

Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd [1996] 3 MLJ 94 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (folld)

Legislation referred to

Industrial Relations Act 1967 s 20(1)

Appeal from: Originating Motion No R1–25–9–94 (High Court, Kuala Lumpur)

N Sivabalah (*Shearn Delamore & Co*) for the appellant.
B Lobo (*Lobo & Associates*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): The appellant is a company that deals in foreign exchange, 'Forex' for short. It acts for customers who speculate on the value of all sorts of currencies. It buys and sells currencies in the money market with a view to profit. It is just like a stockbroker, except that it deals in currencies instead of shares. It has several departments. Each department — or desk, as it is known in the trade — deals with a range of currencies. A licence is required to carry on the business. And Bank Negara exercises strict control over such activities. The respondent was, at all material times, employed as a manager of the appellant. His designation was 'Manager (Forex)'. He was in charge of the continental currencies and the Ringgit desk. Under the terms of his contract of employment, the respondent received a fixed salary as well as a percentage of the profits annually earned by the appellant.

On 21 February 1991, Bank Negara wrote to the appellant stating that with effect from the financial year 1991, money broking companies would not be allowed to share their profits with their employees. There then followed an exchange of correspondence between the appellant and Bank Negara, of which two letters from the latter to the former require mention.

A The first letter is dated 25 March 1991, which contains the following paragraphs:

> We refer to your letter of 26 February 1991 on the above matter and write to inform you that as indicated in our earlier letter of 21 February 1991, all money broking firms, without exception, are required to discontinue profit-
B sharing schemes for their employees.
>
> We take note that Amanah Butler's existing profit-sharing scheme is a contractual obligation under its terms and conditions of employment. We would advise that immediate steps should be taken by your company to renegotiate and implement a new remuneration scheme in order to conform with the above requirement.

C The second letter is dated 15 June 1991, which reads as follows:

> We refer to your letter dated 24 April 1991 on the above matter. Bank Negara Malaysia has no objection to Amanah Butler (M) Sdn Bhd paying bonuses to its employees, provided that the payment of bonus is not on the basis of a contractual obligation calculated as a predetermined percentage
D of its annual profit before tax.

The appellant did not attempt to renegotiate the terms of the contract of employment which the respondent had with it as advised by Bank Negara. Instead, in August 1991, it unilaterally altered the terms and conditions of the respondent's contract by paying him a bonus of a sum far less than that
E he had previously earned by way of commission. The justification advanced for this reduction in income was that the desk of which the appellant was in charge had performed dismally. The appellant also expressed its disappointment at the respondent's performance. In essence, the appellant reduced the respondent's income *not* because of the directive from Bank
F Negara, but for misconduct, namely, the poor quality of the respondent's work.

The respondent was unhappy with the loss in income and the reason given for it by the appellant. He considered himself to have been dismissed and therefore ceased work. He then made representations to the Director General under s 20(1) of the Industrial Relations Act 1967 ('the Act').
G The Director General — having unsuccessfully attempted a reconciliation of the dispute — made his report to the Minister, who then referred the dispute to the Industrial Court. The parties then delivered their pleadings.

The relevant paragraphs of the respondent's statement of case read as follows:

H

> 3.1 In or about August 1991, the company purported to unilaterally vary the terms of the claimant's contract of employment pertaining to the profit-sharing scheme. The claimant then by letter dated 6 August 1991 wrote to the company on the matter. A copy of the said letter is annexed hereto and marked 'CL–1'.
>
> I 3.2 By letter dated 9 August 1991, the company replied to exh CL–1. A copy of the said letter is annexed hereto and marked 'CL–2'.
>
> 3.3 By letter dated 15 August 1991, the claimant wrote to the company, inter alia, that he considered himself dismissed with immediate effect.

A copy of the said letter which is self-explanatory is annexed hereto and marked 'CL–3'.

4 The claimant contends and will contend at the hearing that the said dismissal is without any just cause or excuse.

5 Further or in the alternative the claimant will contend that the said dismissal is contrary to the principles of natural justice and is unfair labour practice which should be struck down as such by the court.

In its statement in reply, the respondent put its case as follows:

4 With regards to para 3 of the statement of case, the company avers the following:

4.1 The claimant commenced employment with the company on 1 October 1976.

4.2 Under the company's performance commission/bonus policy, the company would set aside 30% of its profit before tax to be distributed among all staff.

4.3 Notwithstanding the company's obligation as stated in para 4.2 above, the eligibility and the payment of the performance commission/bonus was not a contractual obligation of the company with each individual staff.

4.4 The quantum of bonus payable to each employee was based on performance and at the sole discretion of the company.

4.5 For the period of January to June 1991, based on his performance, the claimant was given a bonus of RM7,200.

5 By a letter dated 6 August 1991, annexed to the statement of case as exh CL–1, the claimant contended that the company in paying him the bonus had unilaterally varied his contractual rights thus deeming it a breach of his contract.

6 By a letter dated 9 August 1991, annexed to the statement of case as exh CL–2, the company in reply to CL–1 denied that it was in breach of its obligation.

7 By a letter dated 15 August 1991, the claimant contended that he considered himself dismissed by the company with immediate effect. A copy of the said letter has been annexed to the statement of case and marked exh 'CL–3.'

8 Paragraphs 4 and 5 of the statement of case are strictly denied and the claimant is put to strict proof thereof.

8.1 The company categorically denies that the claimant was dismissed from service without just cause or excuse.

8.2 On the contrary, the company avers and will so submit that the claimant abandoned his services with the company without any lawful excuse.

8.3 The company will adduce all relevant evidence at the hearing of this action.

9 Wherefore the company prays that the claimant's claims be dismissed.

After hearing evidence and argument, the Industrial Court dismissed the respondent's complaint. Its reasons are reflected in the following passages extracted from the learned chairman's award:

A The claimant agreed that it was the absolute discretion of the company to pay bonus .... The company's case is that the claimant was not contractually entitled to a profit-sharing scheme and the variation of this scheme by the company was not a breach of his contract entitling him to plead constructive dismissal. The profit-sharing scheme for employees is in writing in the company's personnel manual, exh CO–1, and kept by the Finance and B Administration Manager.

The company's only witness, the general manager, COW–1 produced the original personnel manual which was approved by the board of directors of the company. It contained the terms and conditions of employment. He testified that under the personnel manual, the payment under the profit-sharing scheme was not contractual. It was based on merits of performance C of individual employees. There had been cases of employees receiving zero bonus prior to 1991. Under exh CO–1, the only obligation of the company was to set aside 30% of pre-tax profits for the employees. Apart from labelling of bonus instead of profit-sharing, there was no change in the mode of payment. The general manager further testified that bonus was given on individual performance and it depended on the productivity of D each section. The amount each individual received varied from section to section, individual to individual and year to year.

The personnel manual has expressly stated that bonus is never contractual. Clause 7 is produced below:

> 'The eligibility and the payment of performance commission/bonus is E not a contractual obligation on the part of the company with each individual staff. The company has the full discretion to withhold any part of the whole sum eligible to any staff without having to state any reason for such action.'

The payment of bonus should never be a permanent feature. If it is so, it is not bonus anymore. Bonus is meant as an incentive for workers and staff in F the company. It is uncertain of payment and being paid only when a company makes a profit. Even if it is paid, the amount is unspecified. It is conditional upon the profits made and the performance of each individual staff at the end of the year. In the instant case, apart from the express wordings of the above cl 7 of CO–1, all the features of a non-contractual payment of bonus are abundantly clear from the mode of bonus payment.

G For the above reasons, it is the finding of this court that the claimant was not contractually entitled to any profit-sharing scheme and his contention that he was constructively dismissed must fail on this ground.

The company has not committed a breach of contract which goes to the root of the contract.

H Since this court has held that there is no breach of the claimant's contract of employment to entitle him to claim constructive dismissal, there is no necessity to consider whether his subsequent behaviour could be regarded as having elected to affirm the contract and lose the right to repudiate the contract.

I therefore hold that there is no constructive dismissal as claimed by the I claimant and dismiss his claim.

The respondent, being dissatisfied with the award of the Industrial Court, applied to have it quashed in certiorari proceedings. The High Court

acceded to the application. It issued certiorari, quashed the award and remitted the matter to the Industrial Court for re-adjudication. The reasons for the learned judge's decision appear sufficiently from the following paragraphs in his judgment:

> The learned chairman of the Industrial Court came to the conclusion that the claimant was not contractually entitled to any profit-sharing scheme by relying solely on cl 7 of the personnel manual (exh CO-1). He did not consider at all the contents of the letters written by the company to Bank Negara. The company had, in very clear language, stated that the profit-sharing was contractual and that the company would be committing a breach of the employment contract if a change was made without the consent of the employees. The scheme under the personnel manual is not that of profit-sharing. It is performance commission/bonus. The company did not produce the claimant's contract of employment to throw some light on this matter.
>
> I find that the learned chairman had failed to take into consideration matters which he was bound to consider. The letters written by the company to Bank Negara are very relevant documents and should have been considered as they contradict the company's contention that there was no contractual profit-sharing scheme and that the scheme for payment of bonus as in the personnel manual was not changed by the directive from Bank Negara. He had acted unreasonably. He also did not give any reason why he refused to consider the said documents. I find that the Industrial Court had committed an error going into jurisdiction. I therefore allowed the application in terms of the motion with costs.

Against this decision of the High Court, the appellant has appealed.

The appellant argued that the learned judge had gone wrong in issuing certiorari. It was contended that the learned judge overlooked the directive from Bank Negara. The appellant had, prior to that directive, shared its pre-tax profits with, among others, the respondent. This was done pursuant to the terms of the relevant contract of employment. After receiving the directive from Bank Negara, the appellant could no longer share its profits with its employees. The appellant had not therefore forced the respondent out of his employment and thereby deprived him of his livelihood. Thus ran the appellant's argument.

For the respondent, it was submitted that the appellant must stand or fall by the justification advanced by it in its pleaded case before the Industrial Court. It was nowhere averred by the appellant in its statement in reply that a lower payment by way of bonus was made because of the directive from Bank Negara. Indeed, Bank Negara had advised the appellant to renegotiate the terms of the contract of employment that the appellant had with its employees. This was not done. The justification advanced by the appellant for its conduct was that there was no right vested in the appellant to receive a bonus, which was a benefit that was within the discretion of the appellant as employer. The real reason for paying the respondent a much smaller sum under a different scheme was to punish him for alleged misconduct and thereby to force him out of his work.

Lastly, the Industrial Court had proceeded upon an erroneous basis in that in its award, it had attributed to the respondent a concession which he had never made when he gave his evidence.

So much for the submissions advanced on the respondent's behalf.

At the conclusion of arguments on the appeal, we reserved judgment.

However, before doing so, we requested counsel to put in written argument to supplement their oral submissions. Both counsel have assisted us by delivering written submissions.

Having given this matter our most careful consideration, we have come to the conclusion that this appeal must be dismissed. The reasons for our decision are as follows.

First, we agree with Mr Lobo of counsel for the respondent that the fate of the appellant's case must, *ex necessitae rei*, depend upon its pleadings before the Industrial Court. Indeed, the proposition relied upon by him is concluded by high authority.

In *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, where Raja Azlan Shah CJ (Malaya) (as he then was) said (at p 136):

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. *If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.* (Emphasis added.)

Again, in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, Eusoff Chin Chief Justice, who formed the majority, said (at p 178):

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s 30 of the Act) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. *The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider.* (Emphasis added.)

We too have had occasion to apply this principle quite recently. See *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489.

As may be seen from its statement in reply, the appellant did not rely upon the Bank Negara directive to justify the action it took against the respondent. Consequently, in our view, it is not now open to the appellant at the appellate stage to rely upon an unpleaded case as justification for the action it took against the respondent. The point is — contrary to the first impression we gained of the case — simply not available to the appellant.

Secondly, as found by the learned judge, the Industrial Court had held that the payment of bonus was within the discretion of the appellant as employer without having any regard to the appellant's own admission made in its letters to Bank Negara. Neither did that court give any reasons for excluding these letters from consideration. In the words of the learned judge, the Industrial Court had acted unreasonably. To put it in a phrase, the award was bad for '*Wednesbury* unreasonableness'. No reasonable tribunal similarly circumstanced would have come to a like decision based upon the material made available to the Industrial Court in the present case. This ground of attack involves an examination of the merits of the case: see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 per Edgar Joseph Jr FCJ and *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 94.

Upon a consideration of the merits, it is clear that the appellant did not reduce the respondent's total income in reliance of the Bank Negara directive. It did not do so because the payment of bonus was within its discretion. It did not renegotiate the contractual provision as advised by Bank Negara. It reduced the respondent's earnings because he had performed unsatisfactorily. Had the Industrial Court addressed itself to this issue, to the appellant's letters to Bank Negara as well as the other relevant evidence, it would have certainly found that the respondent had been a victim of unfair labour practice. In the word of his counsel, the appellant had, by its conduct towards the respondent, 'squeezed him out of employment'.

Thirdly, it was clear that the Industrial Court had relied, inter alia, upon an admission allegedly made by the respondent on the issue of bonus during his testimony before that court. In an affidavit filed in support of his application for certiorari, the appellant denied having made the concession. The appellant did not, in the reply affidavit filed on its behalf, rebut this allegation. The allegation is therefore deemed to be accepted by the appellant (see *Rama Chandran*). Although much may not turn upon this point when taken in isolation, it is a factor to be taken into account when ascertaining whether the Industrial Court had acted unreasonably when making its determination.

By reason of the findings made by the learned judge, it was open for him to conclude that the respondent had been dismissed without just cause or excuse. He did not do so only because he did not have the benefit of the jurisprudence that has flowed since his decision. Such a conclusion

A is a natural sequence of logic and deduction that flows from his primary findings.

Since we are seized of the matter, it is open to us — acting upon the decision in *Rama Chandran* — to arrive at such a conclusion. And we do. Indeed, upon the material made available to the Industrial Court, B a finding that the respondent had been dismissed without just cause or excuse is inevitable.

No useful purpose will be served by saying whether the respondent was 'constructively dismissed'. The phrase 'constructive dismissal' is a mere label. It does nothing to clarify matters. On the other hand, it causes C confusion. It is better that the phrase be not resorted to at all: *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137. Unfortunately, the Industrial Court paid too much attention to it. That is why it went wrong in the jurisdictional sense.

We next have to deal with the consequential order made by the learned judge. As earlier observed, he remitted the whole case to the D Industrial Court for rehearing. In view of our finding that the respondent had been dismissed without just cause or excuse, no useful purpose will be served by getting the Industrial Court to deal with the matter afresh. It will only occasion further delay. All that remains to be dealt with is the relief that ought to be given to the respondent.

E In his statement of case, the respondent had asked for reinstatement. This is the usual remedy that is awarded in industrial law. But there may be circumstances where the reinstatement is inappropriate. This is such a case.

The respondent was in a managerial position. The circumstances in F which he left the appellant showed that mutual trust was lacking. After he was dismissed, he joined a stockbroking firm. No useful purpose will be served by uprooting him from his present place of work and thrusting him upon the appellant. Taking into account all the facts and circumstances of the case, we are of the view that the proper remedy in this case is compensation in lieu of reinstatement.

G We have the power and the jurisdiction to grant that relief here and now despite the fact that we intend to dismiss the appeal (see *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors*). The view which this court took in that case has since been approved by the Federal Court: see *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* H (Supreme Court Civil Appeal No 02–57–93), yet unreported.

In the present appeal, we have not had the benefit of any argument upon the quantum. It is therefore best that the matter be left to the Industrial Court to make the assessment.

In the result, the appeal is dismissed. The order of certiorari made by I the learned judge is affirmed. So is the order he made as to costs. The order remitting the case to the Industrial Court is set aside. In its place, we

substitute an order directing the Industrial Court to assess the quantum of compensation that is to be paid by the appellant to the respondent. The respondent will have the costs of this appeal. The deposit paid into court by the appellant shall be paid out to the respondent to account of his taxed costs.

Appeal dismissed.

Reported by K Tang-Wai